LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 15 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term A.D. 1965

No. 570

VICTORIA MUTUAL WATER COMPANY,

*Petitioner,*

*vs.*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

MURRAY M. CHOTINER,
833 Dover Drive, Suite C,
Newport Beach, California,
*Attorney for Petitioner.*

J. ROBERT MADDOX,
9025 Wilshire Boulevard,
Suite 500,
Beverly Hills, California,

H. ROY JEPPSON,
9025 Wilshire Boulevard,
Suite 500,
Beverly Hills, California,
*Of Counsel.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

## SUBJECT INDEX


| | Page |
|---|---|
| Opinion of the court below | 1 |
| Statement of grounds on which jurisdiction is invoked | 2 |
| Questions presented for review | 3 |
| Constitutional provisions, treatises, statutes, ordinances or regulations which this case involves | 3 |
| Statement of the case | 3 |
| Manner in which Federal issue was raised | 8 |
| Argument | 10 |
| 1. The decision of the Supreme Court of the State of California is not in accord in principle with applicable decisions of this court | 10 |
| a. Petitioner was deprived of due process of law because the respondent did not give petitioner notice of the proceedings nor an opportunity to appear in the proceedings and protect its rights | 10 |
| b. Petitioner was deprived of due process of law because the respondent at no time either prior to or during the proceedings announced that petitioner's property rights might be affected by the proceedings | 12 |
| c. Summary | 13 |
| 2. The question of what notice and opportunity to be heard must be afforded persons by regulatory bodies which intend to affect those persons' personal or property rights is one of importance which merits review by this court | 14 |
| Conclusion | 16 |

## Index to Appendices


| | Page |
|---|---|
| Appendix A. Order denying Writ of Review | 1 |
| Appendix B. Opinion | 2 |
| Appendix C. Order Granting Rehearing | 31 |
| Appendix D. Petition for Rehearing | 33 |
| Appendix E. Order Denying Rehearing | 39 |
| Appendix F. Petition for Writ of Review and Points and Authorities in Support Thereof | 40 |
| Appendix G. Constitutional Provisions and Statutes involved | 51 |

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Central Kentucky v. Nashville Gas, 290 U.S. 264. 54 S. Ct. 154 | 16 |
| Griffin v. Griffin, 327 U.S. 220, 66 S. Ct. 556 | 10 |
| Morgan v. United States, 304 U.S. 1, 58 S. Ct. 773 | 12 |
| Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S. Ct. 652 | 11 |
| Napa Valley Electric Co. v. Railroad Commission of California, 251 U.S. 366, 40 S. Ct. 174 | 9 |
| New York ex rel. Woodhaven Gas & Light Co. v. Public Service Commission, 269 U.S. 244, 46 S. Ct. 83 | 16 |
| Ohio Bell Tele. Co. v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724 | 12, 15 |
| People v. Western Air Lines, 42 Cal. 2d 621, 268 P. 2d 723 | 9 |
| Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 58 S. Ct. 334 | 13 |
| Southwest Bell Tele. Co. v. Public Service Commission, 262 U.S. 276, 43 S. Ct. 544 | 16 |

| Miscellaneous | |
|---|---|
| General Order No. 96-A | 7 |

Statutes Page

Act of Congress of June 25, 1948, Chap. 646, 62 Stat. 929 ..... 2

California Public Utilities Code, Sec. 1756 .....3, 8

California Public Utilities Code, Sec. 1757 ..... 15

California Public Utilities Code, Sec. 2705 .....3, 4

United States Code, Title 28, Sec. 1257(3) ..... 2

United States Constitution, Fourteenth Amendment ..... 2

United States Constitution, Fourteenth Amendment, Sec. 1 ..... 3

IN THE

# Supreme Court of the United States

October Term A.D. 1965
No. .....

VICTORIA MUTUAL WATER COMPANY,

*Petitioner,*

*vs.*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the California Supreme Court filed on June 16, 1965, in Victoria Mutual Water Company, Petitioner, vs. Public Utilities Commission of the State of California, Respondent, No. SF 22005.

### Opinion of the Court Below.

The Order of the Supreme Court of the State of California (Case No. SF 22005) denying petitioner's Writ of Review is unreported, and a copy of said Order is attached hereto as Appendix "A" (App. p. 1). The Decision of the Public Utilities Commission of the State of California (Decision No. 68273) from which the petitioner applied for its Writ of Review is reported at 63 Cal. P.U.C. 649, and a copy of said Decision is attached hereto as Appendix "B" (App. pp. 2-30).

## Statement of Grounds on Which Jurisdiction Is Invoked.

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S. Code, Section 1257(3) providing that this Court may, by Writ of Certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege, or immunity, especially set up or claimed under the Constitution, treatises, or statutes of, or commission held or authority exercised under, the United States.

In this cause, petitioner especially set up and claimed a right under that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of life, liberty, or property, without due process of law. Petitioner asserts that the Decision of the Supreme Court of the State of California is repugnant to said Amendment and not in accord with applicable decisions of this Court.

The Decision of the Supreme Court of the State of California denying petitioner's Petition for a Writ of Review was entered on June 16, 1965, and became final on that date for purposes of jurisdiction of this Court. No rehearing of the Petition for Writ of Review was sought or granted. No order was sought or granted for an extension of time with which to petition for a Writ of Certiorari from this Court.

## Questions Presented for Review.

1. Whether petitioner was afforded adequate notice that respondent intended to affect the property rights of petitioner in the proceedings conducted pursuant to the Order granting rehearing made by the respondent, Public Utilities Commission and dated the 26th day of March, 1963, in Application No. 43578 and No. 44149.

2. Whether petitioner was afforded adequate notice of the particular rights which respondent intended to affect by said proceedings.

3. Whether respondent afforded petitioner an adequate opportunity to appear in said proceedings and protect its rights therein.

## Constitutional Provisions, Treatises, Statutes, Ordinances or Regulations Which This Case Involves.

The Constitutional provisions involved are:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statutes involved are:

California Public Utilities Code, Section 1756;
California Public Utilities Code, Section 2705.

The Constitutional provisions and statutes are set forth in full in Appendix "G" (App. pp. 51-52).

## Statement of the Case.

Petitioner is a mutual water company, doing business in the State of California. It is not within the jurisdiction of the Public Utilities Commission of the State

of California by virtue of the fact that it sells water only to these entities and persons specified in Section 2705 of the Public Utilities Code of the State of California.[1]

On July 5, 1961, Suburban Water Systems, hereinafter referred to as "Suburban," and Vallecito Water Company, hereinafter referred to as "Vallecito", filed joint Application No. 43578 before the Commission requesting, among other things, that each of their respective certificated areas be extended and that certain areas which were being served by Vallecito be relinquished to Suburban and that certain areas being served by Suburban be relinquished to Vallecito [P. T. pp. 1-13].[2]

---

[1]California Public Utilities Code, Section 2705, provides as follows:

> "Any corporation or association which is organized for the purpose of delivering water to its stockholders or members at cost, and which delivers water to no one except its stockholders or members, or to the State or any agency or department thereof, to any city, county, school district, or other public district, or to any other mutual water company, at cost, is not a public utility, and is not subject to the jurisdiction, control or regulation of the commission. . . ."

[2]In this Petition, "S. T." will be used to designate the Transcript of the Record before the Supreme Court of the State of California ("P. T." will be used to designate the Transcript of the Record of the Public Utilities Commission, and "T. R." will be used to designate the oral Transcript of the hearings before the Public Utilities Commission affecting petitioner. Only the proceedings which took place commencing with and subsequent to the filing of the Petition for Rehearing by San Gabriel affects petitioner. However, the statement of facts and the Transcript of the Record of the Public Utilities Commission includes such facts and documents prior to this point in time that petitioner feels are necessary to obtain a complete understanding of the matter. In addition, the first eight volumes of the oral Transcript include those proceedings which took place prior to the filing of the Petition for Rehearing by San Gabriel and, therefore, were not certified to this Court because the same do not concern petitioner in any manner. Except as included in the Appendices to the Petition for Writ of Certiorari and Reply to Answer of Respondent to Writ of Review, none of the Transcript of the proceedings before the Public Utilities Commission is included in the Transcript of the pr

Before a decision was rendered on this Application, San Gabriel Valley Water Company, hereinafter referred to as "San Gabriel", appeared in the proceedings and objected to the same on the basis that it had received no notice. Accordingly, the proceedings were continued and on January 29, 1962, San Gabriel filed Application No. 44149 [P. T. pp. 25-42], wherein it requested that any Certificates of Public Convenience and Necessity held by Suburban or Vallecito in certain areas involved in Application No. 43578 be canceled and that San Gabriel be issued a Certificate to serve said areas. The Commission ultimately denied the Application of San Gabriel and granted the Application of Suburban and Vallecito in Decision No. 64047 dated July 31, 1962 [P. T. pp. 52-68]. On March 8, 1963, San Gabriel filed a Petition for Rehearing which sought to reopen the proceedings in Applications No. 44149 and No. 43578, alleging that Suburban, subsequent to Decision No. 64047, had entered into an agreement with Sunset Hills Service Company, a mutual water company not under the jurisdiction of the Public Utilities Commission, hereinafter referred to as "Sunset Hills", whereby Suburban agreed to deliver to Sunset Hills one and one-half million (1,500,000) gallons of water in any twenty-four (24) hour period to the water distribution system of Sunset Hills which lay within the area previously certified to Suburban under Application No. 43578 [P. T. pp. 69-72a]. San Gabriel alleged that this agreement was an attempt by Suburban to circumvent the regulations of the Public Utilities Commission in

---

ceedings before the Supreme Court concerning the Petition for Writ of Review because the Writ was denied and, therefore, the Transcript of the lower tribunal was not sent up to the Supreme Court of California.

the delivery and sale of water in the areas affected by said agreement and prayed that San Gabriel be substituted for Suburban in the areas involved in Application No. 43578. On March 26, 1963, the Commission entered an Order granting a rehearing on Decision No. 64047. A copy of said Order is attached hereto as Appendix "C" (App. pp. 31-32). The Order granting rehearing directs that the Secretary of the Commission to mail notice to all parties in the proceedings. The Notice of Rehearing was directed to Surburban, Vallecito, and San Gabriel and all interested parties, but was served only upon the three entities specifically named [P. T. p. 74]. The rehearing on these matters was held in Los Angeles on July 22, 23, 30 and 31, 1963.

Prior to the rehearing, Sunset Hills, which is a Nevada corporation, applied to the California Corporations Commissioner for authority to issue its shares in California. However, Sunset Hills encountered difficulty with the California Corporations Commissioner and withdrew its Application. Subsequently, the partially completed facilities of Sunset Hills to supply water in the areas certified to Surburban were transferred to petitioner. Petitioner entered into an agreement with Suburban whereby Surburban agreed to deliver on demand up to fifteen hundred (1500) gallons of water per minute. Petitioner commenced serving water in these areas upon completion of the distribution system in the tracts. However, on July 29, 1963, prior to the rehearing, Surburban and petitioner entered into an agreement whereby all of

the water facilities owned by petitioner in the areas certified to Surburban were transferred to Surburban.

On November 25, 1964, the respondent handed down Decision No. 68273 pertaining to the rehearing on Applications No. 43578 and No. 44149 in which the Commission found that petitioner was the alter ego of Suburban and had operated as a public utility from at least March 7, 1963 (there is no indication in the Decision how the Commission arrived at the date of March 7, 1963) to the date of the Decision had dedicated its property and service to the public use, and ordered that Suburban cause petitioner to file with the Commission, within ninety (90) days after the effective date of the Order:

(1) A schedule of its rates and charges, together with rules governing service to customers, a tariff service area map and sample copies of printed forms normally used in connection with customers' services, in accordance with the requirements of General Order No. 96-A;

(2) Four copies of a comprehensive map, drawn to an indicated scale of not more than 400 feet to the inch, delineating by appropriate markings the tracts of land and territory which it serves, the principal water production, storage and distribution facilities and the location of its various water system properties (App. pp. 28-29).

**Manner in Which Federal Issue Was Raised.**

On December 24, 1964, within the time authorized by California law, the petitioner filed a Petition for Rehearing with the respondent. A copy of said Petition is attached hereto as Appendix "D" (App. pp. 33-38). The fourth paragraph of said Petition for Rehearing reads as follows:

> "Victoria is not a party to the above referred to Applications and was never served with notice of the hearing hereon or the Petition for Rehearing of said matters. By virtue of its finding that Victoria is a public utility and has dedicated its property and serveice to the public use, the Public Utilities Commission has deprived Victoria of property without due process of law, thereby violating the Fourteenth Amendment of the Constitution of the United States. Furthermore, since Victoria was not given notice of these matters, the Public Utilities Commission has no jurisdiction to issue any order affecting the property rights or operations of Victoria." (App. pp. 35-36).

On March 2, 1965, the Petition for Rehearing was denied by respondent. A copy of the Order denying said Petition is attached hereto as Appendix "E" (App. p. 39). Within thirty (30) days after the denial of the rehearing, petitioner filed a Writ of Review with the Supreme Court of the State of California in compliance with *California Public Utilities Code,* Section 1756.[3] A

---

[3] *Section* 1756. *Writ of Certiorari.*
"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court

copy of said Petition for Writ of Review is attached here to as Appendix "F" (App. pp. 40-50). Petitioner asserted the following therein:

> "The Commission has exercised in personam jurisdiction over petitioner without giving it notice that any of its property rights would be affected thereby in violation of due process of law required by the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California. No person can be affected by a hearing or adjudication of a court of justice or tribunal acting in a judicial manner without his voluntary appearance or affording to him by means of the service of process an opportunity to appear and contest a claim that may be made against him."[4]

On June 16, 1965, the Supreme Court of the State of California summarily denied petitioner's Petition for Writ of Review [Appendix "A" App. p. 1; S. T. p. 74]. The denial of petitioner's Writ of Review is a judgment on the merits of the case.

> *Napa Valley Electric Co. v. Railroad Commission of California,* 251 U.S. 366, 372-373, 40 S. Ct. 174 (1920);
>
> *People v. Western Air Lines,* 42 Cal. 2d 621, 630, 268 P. 2d 723 (1954).

---

of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. (As amended Stats. 1963, c. 461, p. 1310, §6.)"

[4]Although petitioner initially alleged that the Commission exercised *in personam* jurisdiction over petitioner, it concedes that the jurisdiction of the Commission is *in rem.* [S. T. p. 65, lines 14-20].

## ARGUMENT.

### 1. The Decision of the Supreme Court of the State of California Is Not in Accord in Principle With Applicable Decisions of This Court.

#### a. Petitioner Was Deprived of Due Process of Law Because the Respondent Did Not Give Petitioner Notice of the Proceedings nor an Opportunity to Appear in the Proceedings and Protect Its Rights.

Petitioner was not a party to the joint Application of Suburban and Vallecito (Application No. 43578) or San Gabriel (Application No. 44149). Neither the Petition for Rehearing [P. T. pp. 69-72a], the Order Granting Rehearing [Appendix "C" App. pp. 31-32; P. T. p. 73], or the Notice of Rehearing [P. T. p. 74] names the petitioner as a party to the rehearing nor were any of these documents served upon petitioner.Several of petitioner's officers were subpenaed as witnesses and were represented by counsel but petitioner at no time made an appearance in the proceedings, nor did the Commission permit the petition to appear therein [R. T. pp. 985-986].

Petitioner submits that the failure of respondent to give petitioner notice of the proceedings deprived petitioner of its property without due process of law and is not in accord with applicable decisions of this Court.

The case of *Griffin v. Griffin*, 327 U.S. 220, 66 S. Ct. 556 (1946) involved a Writ of Certiorari to the United States Court of Appeals for the District of Columbia. Respondent had obtained a divorce from petitioner in New York in 1924 which was modified in

1926. In 1936 a decree was entered determining that certain amounts of alimony were owing from petitioner. All of these proceedings were contested. In 1938, without notice, judgment was docketed in favor of respondent for the alimony due upon the 1936 order and for all alimony which had subsequently accrued. Respondent sued petitioner in the District Court of Columbia upon the 1938 judgment and was awarded a summary judgment. On Certiorari, this Court determined that the 1938 judgment was lacking in procedural due process and was unenforceable. The Court held that because of the want of notice, petitioner was deprived of an opportunity to raise defenses which might have accrued since the 1936 proceedings. The Court stated that proper notice cannot be dispensed with even in the case of a judgment *in rem* with respect to property within the jurisdiction of the Court rendering the judgment.

The landmark case of *Mullane v. Central Hanover Bank*, 339 U.S. 306, 70 S. Ct. 652 (1950) involved a petition by a trust company for a judicial settlement of accounts. The trust company failed to give personal notice of the proceedings to certain beneficiaries of the trust involved although it knew the whereabouts of the beneficiaries. The Court stated that this was a violation of procedural due process and that all interested parties must be given notice that fairly appraises them of the pending proceedings and to afford them an opportunity to appear.

**b. Petitioner Was Deprived of Due Process of Law Because the Respondent at No Time Either Prior to or During the Proceedings Announced That Petitioner's Property Rights Might Be Affected by the Proceedings.**

Neither the Petition for Rehearing the Order Granting Rehearing or the Notice of Rehearing state that one of the issues of the rehearing was to be whether or not petitioner was a public utility and had dedicated its property and business to the public use. Furthermore, at no time in the proceedings did the Commission even elude to the possibility that petitioner might be found to be a public utility and have dedicated its business and property to the public use. Therefore, petitioner had no opportunity whatsoever to either rebut the Commission's evidence or finding or to offer evidence in its behalf.

The case of *Ohio Bell Tele. Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724 (1937) involved a rate hearing. After extensive hearings, the Commissioner determined a rate formula on a basis that completely ignored the evidence presented at the hearing and was based upon certain price indices and documents which Ohio never had a chance to inspect and were not presented at the hearing. This Court held that such procedure was in violation of Ohio's right to due process. It was further held that in order for due process to be satisfied, Ohio had a right to examine the documents, to analyze them, and to explain or rebut them.

The case of *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 773 (1938) involved an appeal from the District Court challenging the validity of maximum rates

fixed by the Secretary of Agriculture for market agencies at the Kansas City stockyards. The question presented was whether adequate due process had been afforded the appellants. The Court held where the government did not set forth its contentions concerning the rates at any part of the proceedings and appellants were not afforded the opportunity to examine the findings until they were served with the order fixing the rates, due process was violated. The Court stated that the right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right might be a barren one. (304 U.S. 18).

In the case of *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393, 58 S. Ct. 334 (1937), Mr. Justice Hughes stated:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to a litigant by the Federal Constitution as a principal requirement (Citation). There must be due process and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily."

**c. Summary.**

Failure of the respondent to give any type of notice to petitioner or to indicate at any point in the proceedings that it intended to subject petitioner to its jurisdiction, constituted a gross violation of petitioner's Constitutional rights. Prior to Decision No. 68273, petitioner was a mutual water company and, therefore,

not within the jurisdiction of the Public Utilities Commission. By virtue of the subject hearing and Decision, petitioner will be subjected to the jurisdiction of the Public Utilities Commission. As a result thereof, petitioner cannot sell, lease, encumber or assign any of its assets which might be deemed to be public utility assets without the approval of respondent. Petitioner cannot provide water to any person without first obtaining approval of respondent nor can it make any charge for water unless the respondent approves the same. Petitioner will be burdened with these restrictions without ever being afforded the opportunity to appear in the proceedings and to defend its property rights therein.

**2. The Question of What Notice and Opportunity to Be Heard Must Be Afforded Persons by Regulatory Bodies Which Intend to Affect Those Persons' Personal or Property Rights Is One of Importance Which Merits Review by This Court.**

Our lives and property are being governed to a greater and greater extent by regulatory and administrative bodies with broad powers whose decisions and orders are not subject to the same rigorous review as decisions of judicial bodies in spite of the fact that their effect may be just as broad.

In California, for instance, the only review of a decision of the Public Utilities Commission is directly to the Supreme Court of California on a discretionary writ, and review is limited to the question of whether the Commission has regularly pursued its authority, including a determination of whether the order or decision

under review violates any right of the petitioner under the Constitution of the United States or of this State.

*California Public Utilities Code*, Sec. 1757.

Petitioner submits that because of the limited judicial review in California, the Public Utilities Commission has become somewhat lax in honoring or protecting the Constitutional rights of interested parties in hearings before the Commissioner. Petitioner further submits that this Honorable Court should exercise its discretion and review the Commssion's Order as it pertains to this petitioner in order to set forth guide lines for the Public Utilities Commission of the State of California and other like regulatory bodies concerning the protection of the Constitutional rights of persons before such bodies or subject to regulation by such bodies.

The *Court in Ohio Bell Tele. Co. v. Public Utilities Commission, supra,* forcefully summarized petitioner's views when it stated at 301 U.S. 304:

> "Regulatory commissions have been assigned with broad powers within the sphere of duty assigned to them by law . . . indeed much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (Citations) of a fair and open hearing be maintained in its integrity (Citations). The right to such a hearing is one of 'the rudiments of fair play' (Citations) assured to every litigant by the Fourteenth Amendment as a minimum requirement (Citations.) There can be no compromise on the footing of convenience or ex-

pediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

This Court in the past has seen fit to hear cases concerning whether rates fixed by public utilities commissions were confiscatory,

*Southwest Bell Tele. Co. v. Public Service Commission,* 262 U.S. 276, 43 S. Ct. 544 (1923);

*Central Kentucky v. Nashville Gas,* 290 U.S. 264, 54 S. Ct. 154 (1933).

or whether a company should be required to extend its main lines,

*New York ex rel. Woodhaven Gas & Light Co. v. Public Service Commission,* 269 U.S. 244, 46 S. Ct. 83 (1925).

Petitioner submits that the question of whether or not petitioner was afforded due process in the proceedings before the respondent is a question of at least comparable importance, if not more so, as the questions raised in the aforementioned cases.

**Conclusion.**

Petitioner respectfully submits that there are special and important reasons for granting a Writ of Certiorari in this matter as more fully set forth above.

Respectfully submitted,

MURRAY M. CHOTINER,
By MURRAY M. CHOTINER,
*Attorney for Petitioner.*

J. ROBERT MADDOX,
H. ROY JEPPSON,
*Of Counsel.*

## APPENDIX "A."

### Order Denying Writ of Review.

S.F. No. 22005

In the Supreme Court of the State of California in Bank.

Victoria Mutual Water Company v. Public Utilities Commission.

Petition for writ of review Denied.

Traynor
Chief Justice

## APPENDIX "B."

### Opinion.

Decision No. 68273.

Before the Public Utilities Commission of the State of California.

In the matter of the Application of San Gabriel Valley Water Company for a certificate of Public Convenience and Necessity to furnish Water Service in Territory near the City of La Puente and City of Industry in Los Angeles County, California, and for Authority to Establish Rates for Service therein. Application No. 44149.

In the Matter of Joint Application of Suburban Water Systems and Vallecito Water Company for Exchange of Portions of Service Area and for Certificates of Public Convenience and Necessity. Application No. 43578 (Amended).

Brobeck, Phleger & Harrison, by *Robert N. Lowry* for applicant in Application No. 44149 and protestant in Application No. 43578.

*John E. Skelton,* for San Gabriel Valley Water Company as applicant in Application No. 44149 and protestant in Application No. 43578.

*Arthur Guy,* for Suburban Water Systems, applicant in Application No. 43578 and protestant in Application No. 44149.

*William M. Lassleben, Jr.,* for Vallecito Water Company as applicant in Application No. 43578 and protestant in Application No. 44149.

*Hugh N. Orr, C. O. Newman* and *A. L. Gieleghem,* for the Commission staff.

These consolidated matters are before the Commission after a rehearing. Applications Nos. 43578 and 44149, in part, seek authority to serve the same areas. Application No. 43578 was jointly filed by Suburban Water Systems (hereinafter called Suburban) and Vallecito Water Company (hereinafter called Vallecito). In Application No. 43578, Suburban and Vallecito sought authority to do the following: (1) Vallecito sought authority to extend its service to a tract contiguous to its service area referred to as Area E; (2) Suburban sought authority to serve an area contiguous to its service area referred to as Area D; (3) Vallecito sought authority to serve an area, referred to as Area A, which was part of Suburban's service area, and Suburban sought authority to relinquish Area A to Vallecito; (4) Suburban sought to serve an area, referred to as Area B, which was part of Vallecito's service area, and Vallecito sought authority to relinquish Area B to Suburban; (5) Suburban sought authority to serve an area east of Vallecito's service area referred to as Area C; (6) Suburban sought authority to establish rates in the areas it might be authorized to serve; and (7) Suburban requested authority to deviate from its main extension rule by refunding advances according to the proportionate cost method[1] with common stock instead of cash.

---

[1]The Suburban-Vallecito application was filed before Decision No. 64536 (Consolidated Case No. 5501 and Application No. 40579) was entered by the Commission. Decision No. 64536 revised the main extension rule required to be in the rules of all public utility water companies subject to the jurisdiction of this Commission. Decision No. 64536 established a new main extension rule which eliminated the proportionate cost method of making refunds in subdivisions. All prior decisions in these consolidated matters were prior to the effective date of Decision No. 64536.

A public hearing on the Suburban-Vallecito application was held on December 7, and 8, 1961, and it was adjourned to December 28, 1961. On December 28, 1961, San Gabriel Valley Water Company (hereinafter called San Gabriel) appeared at the hearing as a protestant and claimed lack of notice of the prior hearings. In the circumstances, a continuance was granted and the hearing was adjourned to a later date in 1962. On January 16, 1962, the Commission entered an interim opinion and order in Application No. 43578 (Decision No. 63116). The Interim Opinion found that San Gabriel did not have notice of the prior dates of hearing. It also found that two of the requests by Suburban and Vallecito related to serving contiguous territories where there were tracts under construction, and that no good reason existed for withholding action on these areas. The Interim Order authorized Vallecito to serve Area E and Suburban to serve Area D.

On January 29, 1962, San Gabriel filed Application No. 44149 wherein it sought authority to serve Areas A, B, and C, and requested that the Commission cancel any certificates of public convenience and necessity previously granted to Vallecito or Suburban insofar as those certificates related to Areas A and B.

Application No. 43578 (Suburban-Vallecito) was consolidated for further hearing with Application No. 44149 (San Gabriel). A hearing was held on the consolidated applications on February 8, and 9, and March 19, and 20, 1962. These matters were submitted on April 2, 1962. On July 31, 1962 this Commission entered Decision No. 64047, which, in part, found that there was no material difference in the service proposed by Suburban-Vallecito and San Gabriel with re-

spect to Areas A, B, and C; that Suburban and Vallecito could serve these areas with plant costing less than that required by San Gabriel; that the service areas of Suburban and Vallecito were contiguous to the areas which they proposed to serve and that Suburban and Vallecito should be allowed to serve the areas. By Decision No. 64047 San Gabriel's application was denied, and Vallecito was authorized to transfer Area B to Suburban and Suburban to transfer Area A to Vallecito. Suburban was granted authority to serve Areas B and C. Vallecito was granted authority to serve Area A.

On March 8, 1963, San Gabriel filed a Petition For Rehearing which sought to reopen these consolidated proceedings. The petition alleged that subsequent to the entry of Decision No. 64047, Suburban entered into an agreement with a Nevada corporation called Sunset Hills Service Company (hereinafter called Sunset Hills) whereby Suburban agreed to deliver to Sunset Hills, on demand, one and one-half million gallons of water in any 24-hour period to the water distribution system of Sunset Hills; that the distribution system of Sunset Hills was in the area certificated to Suburban in Decision No. 64047; that Sunset Hills represented to the California Corporation Commissioner that it was a duly qualified mutual water company and sought authority to reissue its stock; that Sunset Hills had represented to the Corporation Commissioner that a subdivider in the area, Sunset International Petroleum Company (hereinafter called Sunset International), had deposited with it $118,100 to cover the cost of installing a water distribution system, and that Sunset Hills had tied in its distribution system to one of Suburban's 16-inch

mains. The Petition for Rehearing alleged that San Gabriel believed that the foregoing acts constituted "an attempt by Suburban, in collaboration with Sunset International, to circumvent and thwart the regulation of the Public Utilities Commission in the delivery and sale of water in a substantial portion of . . . Areas B and C." San Gabriel asked that Applications Nos. 43578 and 44149 be reopened, evidence taken, and that Decision No. 64047 be amended to revoke Suburban's certificate to serve Areas B and C and grant San Gabriel authority to serve those areas.

On March 26, 1963, the Commission entered an order granting a rehearing on Decision No. 64047. A duly noticed public hearing was held in these consolidated matters before Examiner Jarvis at Los Angeles on July 22, 23, 30, and 31, 1963.

It appears that Suburban and Sunset International were dissatisfied with Decision No. 64047, which became effective on August 20, 1962. As a result, there was set in motion the chain of events and machinations hereinafter detailed.

On November 28, 1962, Sunset International entered into an agreement with Sunset Hills whereby Sunset Hills agreed to construct a water system and to provide water service for 97 lots in Tract No. 27171, which are located within Areas B and C. Sunset International put up a $46,500 deposit and agreed to reimburse Sunset Hills for the actual cost of constructing the water system involved. On February 8, 1963, a similar agreement with a $72,580 deposit, was entered into between Sunset International and Sunset Hills with respect to 106 lots in Tract No. 27172, which are located within Area C. As indicated, Sunset Hills is a Nevada cor-

poration. Roger Ellis is, and was at all times herein mentioned, a vice president of Sunset Hills. Mr. Ellis is a vice president of Valinda Engineering Company (hereinafter called Valinda) and was president and director of Victoria Mutual Water Company (hereinafter called Victoria) from January 1, 1962 to July 17, 1963. Camille Garnier is, and was at all times hereinafter mentioned, the president of Valinda and owns 85 percent of its stock. Garnier is, and was at all times herein mentioned, the president of Suburban. He owns outright 3 percent of Suburban's stock and represents a voting trust which holds an additional 13 percent of that stock. Garnier also has an interest in Garnier Pipeline Company. At the hearing, Ellis testified that John Harper is, and was at all times mentioned, the secretary of Sunset Hills. Harper is an employee of Pacific Utilities Service which is a division of Valinda (hereinafter referred to as PACUS). At the hearing, Ellis was unable to recollect the names of any of the other officers of Sunset Hills.

The cost estimate for Tract No. 27171 was prepared by an employee of the PACUS Division of Valinda and the cost estimate for Tract No. 27172 was prepared by a Valinda employee. Sunset Hills engaged Valinda to do certain work in connection with the water systems provided for in the aforesaid agreements. Sunset Hills, however, had no source of water of its own. On February 19, 1963, Sunset Hills entered in an agreement with Suburban whereby Suburban agreed to furnish Sunset Hills, on demand, 1,500,000 gallons of water in any

24-hour period of time. Sunset Hills encountered difficulty with the California Corporation Commissioner respecting its request for authority to issue its shares in California, and thereby do business as a mutual water company, and Sunset Hills withdrew the application.

Sunset Hills arranged for the construction of the distribution systems in Tracts Nos. 27171 and 27172. Valinda and Garnier Pipeline Company did the actual construction. When Sunset Hills encountered difficulties with the Corporation Commissioner, it turned over the partially installed facilities in Tracts Nos. 27171 and 27172 to Victoria. The record indicates that at the time of the present hearing legal title to these distribution systems had not yet been transferred from Sunset Hills to Victoria. At the time the facilities were transferred to Victoria, Suburban owned more than half of the outstanding shares of Victoria. Ellis was the president and a director of Victoria. Harper was a vice president and a director of Victoria. Carr Dietz, who at all times herein mentioned was and is the secretary of Valinda and the secretary-treasurer (with a 1.3 percent stock interest) of Suburban, was a director and secretary-treasurer of Victoria. Dwight Holcomb was a vice president and a director of Victoria, and Garnier was the remaining director. Victoria has no employees, and had none at all times herein mentioned. Victoria operates by having all its services performed by the PACUS Division of Valinda.

Victoria arranged to have the distribution system completed in Tracts Nos. 27171 and 27172. It advised the California Real Estate Commissioner that it would serve these tracts. Victoria possesses certain water supply sources. In addition, it entered into an agreement with Suburban, whereby Suburban agreed to deliver on demand up to 1,500 gallons per minute. Victoria commenced serving water in Tracts Nos. 27171 and 27172 upon completion of the distribution systems in the tracts. It continued to serve these tracts until the events hereinafter further detailed.

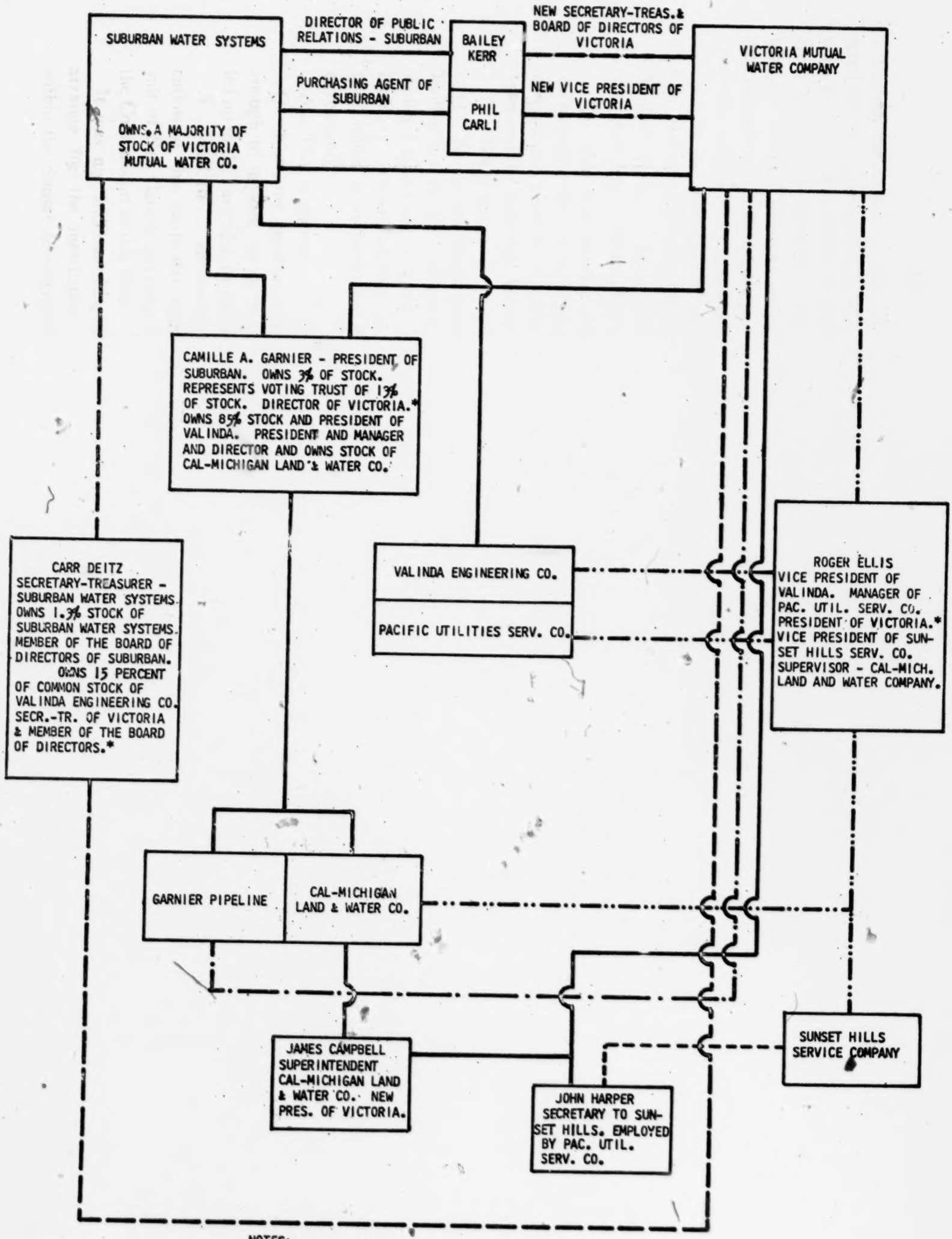
Victoria provided water service in Tracts Nos. 27171 and 27172 at rates higher than those which Suburban was authorized to charge. A comparison of these rates is as follows:

3/4-Inch Meters

| Quantity Per Month In Cu. Ft. | Suburban Water Systems | Victoria Mutual Water Co. |
|---|---|---|
| 800 | $ 2.70 | $ 5.50 |
| 1000 | 2.70 | 6.04 |
| 1200 | 2.70 | 6.58 |
| 1400 | 2.70 | 7.12 |
| 1600 | 3.00 | 7.66 |
| 1800 | 3.30 | 8.20 |
| 2000 | 3.60 | 8.74 |
| 3000 | 5.10 | 11.44 |
| 4000 | 6.40 | 14.14 |
| 5000 | 7.70 | 16.84 |
| 10000 | 14.20 | 30.34 |
| 20000 | 24.20 | 57.34 |

The notice setting the rehearing in these matters was mailed on June 25, 1963. The first day of rehearing was July 22, 1963. On July 17, 1963, new officers and directors of Victoria were elected. James Campbell was elected president and a director. Campbell is the superintendent of the California-Michigan Land and Water Company. Garnier is the president, manager, and a director of the California-Michigan Land and Water Company, and he owns all of its common stock. Phil Carli was elected a vice president and a director. Carli is the purchasing agent for Suburban. Bailey Kerr was elected secretary-treasurer and a director. Kerr is the director of public relations of Suburban. Dwight Holcomb was elected a vice president and a director.

On July 22, 1963, Deitz testified respecting the new officers and directors of Victoria. He did not mention Holcomb. Counsel for San Gabriel had subpoenas issued for all who were mentioned. Service of all the subpeonas was not effectuated. However, all the new officers, except Holbomb, were present and testified at the hearing on July 30, 1963. Exhibit No. 41, which was received in evidence on July 30, 1963, was the first indication of Holcomb's relationship with Victoria (although it appears he has been an officer and director since January 1, 1962). Since Holcomb did not appear as a witness in these consolidated proceedings, his connections, if any, with any of the entities and individuals here involved were not fully explored. A diagram of some of the various relationships discussed in this decision is set forth as Figure No. 1.


SUBURBAN WATER SYSTEMS
OWNS A MAJORITY OF STOCK OF VICTORIA MUTUAL WATER CO.
DIRECTOR OF PUBLIC RELATIONS - SUBURBAN
PURCHASING AGENT OF SUBURBAN
BAILEY KERR
PHIL CARLI
NEW SECRETARY-TREAS. & BOARD OF DIRECTORS OF VICTORIA
NEW VICE PRESIDENT OF VICTORIA
VICTORIA MUTUAL WATER COMPANY
CAMILLE A. GARNIER - PRESIDENT OF SUBURBAN. OWNS 3% OF STOCK. REPRESENTS VOTING TRUST OF 13% OF STOCK. DIRECTOR OF VICTORIA.* OWNS 85% STOCK AND PRESIDENT OF VALINDA. PRESIDENT AND MANAGER AND DIRECTOR AND OWNS STOCK OF CAL-MICHIGAN LAND & WATER CO.
CARR DEITZ SECRETARY-TREASURER - SUBURBAN WATER SYSTEMS. OWNS 1.3% STOCK OF SUBURBAN WATER SYSTEMS. MEMBER OF THE BOARD OF DIRECTORS OF SUBURBAN. OWNS 15 PERCENT OF COMMON STOCK OF VALINDA ENGINEERING CO. SECR.-TR. OF VICTORIA & MEMBER OF THE BOARD OF DIRECTORS.*
VALINDA ENGINEERING CO.
PACIFIC UTILITIES SERV. CO.
ROGER ELLIS VICE PRESIDENT OF VALINDA. MANAGER OF PAC. UTIL. SERV. CO. PRESIDENT OF VICTORIA.* VICE PRESIDENT OF SUNSET HILLS SERV. CO. SUPERVISOR - CAL-MICH. LAND AND WATER COMPANY.
GARNIER PIPELINE
CAL-MICHIGAN LAND & WATER CO.
JAMES CAMPBELL SUPERINTENDENT CAL-MICHIGAN LAND & WATER CO. NEW PRES. OF VICTORIA.
JOHN HARPER SECRETARY TO SUNSET HILLS. EMPLOYED BY PAC. UTIL. SERV. CO.
SUNSET HILLS SERVICE COMPANY

NOTES:
* FROM JANUARY 1, 1962 TO JULY 17, 1963.

MRS. WHITE, THE SISTER OF CAMILLE A. GARNIER, TOGETHER WITH HER HUSBAND OWNS AN UNSPECIFIED AMOUNT OF STOCK IN SUBURBAN WATER SYSTEMS.

FIGURE NO. 1

During the course of the rehearing, Suburban entered into an agreement with Victoria whereby the systems in Tracts Nos. 27171 and 27172 were transferred from Victoria to Suburban. The testimony of Suburban and Victoria directors or officers makes it clear that throughout all the events previously discussed Victoria was controlled and dominated by Suburban and was in fact the *alter ego* of Suburban. Pertinent portions of the testimony are as follows:

Walter Hannon, Suburban's vice president in charge of operations testified as follows:

"Q. Are you familiar with the circumstances surrounding the ultimate agreement that has been entered into between Victoria Mutual Water Company and the Suburban Water Systems?

A. Yes, I am.

Q. Would you please narrate the circumstances leading up to the execution of this agreement, which I might ask, however, in the way of a preliminary question, whether or not it is your signature which is reflected on the last page of the agreement?

A. That is correct.

Q. Now, my question was: would you be kind enough to narrate for us the circumstances which led up to the execution of this agreement?

A. Well, the circumstances which led to the execution of this particular agreement were the result of San Gabriel pressing the issue here before the Commission at this time.

It was my understanding that Victoria was to arrange for the installation for water facilities within the Sunset development and when such fa-

cilities were completely installed, they were to be turned over to Suburban.

Q. That was the Suburban Water Systems' management conclusion and understanding; is that correct?

A. My understanding.

MR. LOWRY: I object to the question because the witness had said that he did not know directly what the decision was, said that that was his understanding and followed, that understanding is followed by a point-blank question calling for a point-blank answer.

I think the question is improper.

MR. GUY: I will withdraw the question and ask it this way: did you have any discussions, and if so with whom, regarding the ultimate acquisition by Suburban Water Systems of the water service facilities installed by Victoria Mutual, answer yes or no?

THE WITNESS: Yes.

Q. Approximately when did those discussions —when did a discussion take place and who else was present?

A. Well, I had a discussion with Mr. Garnier and Mr. Dietz at the very beginning of the time when Victoria started to prepare to serve the area, that it was my understanding from them at that time that after the facilities had been installed in the development and completed, they would be turned over to Suburban and Suburban would assume the refund agreement responsibility." (Reporter's Transcript, pp. 1097-99).

. . .

"Q. What is the position of the developer in connection with this change in over-all plan?

A. He agreed that he would be satisfied with it.

Q. Did you have any conversation with him?

A. I did not personally. I was present in the room on one end of the conversation. I did not talk to him myself.

Q. You heard him speak; is that correct?

A. That is correct.

Q. What was the question put to him and what was his answer and who made the inquiry of him?

A. Mr. Garnier.

Q. And what was Mr. Garnier's inquiry as best you can recall?

A. He explained that the San Gabriel Water Company had brought the thing to the attention of the Commission a little sooner than he had anticipated and he expected that they could complete the entire development before changing over the agreements, Suburban assuming the agreements, and Mr. Walter said, 'Go right ahead, anything you have to do, because I don't want San Gabriel to serve it.'

Q. That was his response; is that correct?

A. That is correct." (Reporter's Transcript, pp. 1100-01.)

. . .

"Q. At the top of page 2, the second whereas paragraph refers to the fact that it was contemplated between Victoria and Suburban that certain facilities would be transferred from Victoria to

Suburban. How long has that been in contemplation?

A. From the outset.

Q. What do you consider to be the outset?

A. The time Victoria began servicing the area.

Q. When did it begin servicing the area?

A. I mean when it started installation of facilities in the area.

Q. When did it start installation of facilities in the area?

A. When they signed the agreement with the developer and started making the installation, I don't have those dates.

Q. Then this contemplation goes back to some time, the exact date of which you do not know?

A. Goes back to the time that Victoria and Sunset International agreed that Victoria would make the installation.

Q. Well, was Suburban a party to that? So it was a three-way arrangement between Sunset International and Suburban?

A. I would say they would be.

Q. My question—

A. Mr. Garnier was the President of Suburban and he was cognizant of the agreement.

Q. Do you have direct knowledge yourself, Mr. Hannon, as Vice-President of Suburban, of the correctness of the statement that it was contemplated between Victoria and Suburban that these water facilities would be transferred after installation by Victoria?

A. That was Mr. Garnier's agreement with Mr. Deitz and myself, yes.

Q. And in what capacity were each of the three of you acting, Mr. Deitz, as you appreciate, at times has been an officer of Victoria?

A. Mr. Deitz was acting as Secretary of Suburban, Mr. Garnier was acting as President of Suburban and I was Vice-President of Suburban.

Q. Now, how could the three of you representing only one party to the transaction reach agreements with respect to the transfer of facilities between Victoria and Suburban? You must have had agreements with somebody at Victoria, did you not?

A. I think it would be relatively simple inasmuch as Suburban owned the majority of the control of stock in Victoria.

Q. You were just agreeing among yourselves, were you not?

A. That is correct." (Reporter's Transcript, pp. 1109-11.)

. . .

"Q. From Suburban's point of view why is Suburban allowing Victoria to install these facilities and then transfer them to Suburban when Suburban could possibly install them directly itself?

A. There are a number of reasons.

Q. Would you give them to us?

A. No. 1, we asked for higher rates in the area at the time of the rate hearing, we made application for A and B rates and they were denied.

Q. Will you indicate what you mean by 'A and B rates'?

A. The A rate was the lower altitude and B was the higher altitude service area, but in the de-

cision the Commission admonished Suburban not to burden the remainder of the consumers in the area by serving the higher elevations without proper rate.

We subsequently requested the Commission to allow us to use our Highland area tariff rates which were on file with the Commission, and the Commission refused that request.

So it was the consensus of management opinion that Victoria might go ahead with the installation and gain some experience of cost of service in the area, which could be presented to the Commission later on.—

Q. Would Victoria's costs—

A. —as a request for definite rates to be assigned in the area.

Q. Would the cost to Victoria of installing the facilities for transfer to Suburban be any different than Suburban's costs of installing the facilities directly?

A. No, sir, I don't believe they would be.

Q. In what way, then, would Suburban gain in its relationships with the Commission by having Victoria install the facilities and then transfer them to Suburban?

A. Again in relation with the Commission?

Q. Yes.

A. I don't believe it would gain on its relationship with the Commission.

Q. What significance, then, would it be to have Victoria develop cost information that would be presented to the Commission if after the facilities were installed Suburban would be the operator of them?

A. We would have experiences that could be shown to the Commission as cost of service in the area.

Q. Could you not get that information experience directly by installing the facilities yourself, namely, Suburban?

A. Yes. In the meantime Suburban would be taking the loss.

Q. Who is taking the loss in the meantime when Victoria is developing the cost experience?

A. Suburban isn't.

Q. Who is the logical man that would be doing that?

A. I don't think there is any loss incurred because the rates being charged by Victoria are sufficient to cover their costs and they are higher than Suburban rates.

Q. Who bears those rates?

A. The customers in the service area." (Reporter's Transcript, pp. 1114-16.)

The minutes of the Victoria Board of Directors' meeting at which the agreement to transfer the facilities in Tracts Nos. 27171 and 27172 to Suburban was approved show that all of the directors were present. Three of the four directors testified in this proceeding. Kerr testified as follows:

"Q. Do you have any personal knowledge of the operations of Victoria Mutual Water Company and its facilities for serving water in the area?

A. I have a general knowledge.

Q. How do you acquire that knowledge?

A. Mostly through hearsay.

Q. Have you participated in the management of the operation of Victoria Mutual Water Company in the areas which we have been discussing, particularly Tracts 27171 and 27172?

A. No, sir, I have not.

Q. Have you discussed the ability of Victoria Mutual Water Company to provide water service to tracts numbered 27171 and 27172?

A. Yes, sir, I have discussed it briefly.

Q. With whom?

A. With Mr. Carr Deitz, who is the former Secretary of Victoria Mutual.

Q. With anyone else?

A. I don't believe so.

Q. Is your knowledge of the operation and the facilities of the Victoria Mutual Water Company obtained from the information which you derived from Mr. Deitz?

A. Yes, sir." (Reporter's Transcript, pp. 1061-62.)

. . .

"Q. Do you know what in the absence of any written agreement the practice will continue to be for Sunset International to advance costs to Victoria with respect to facilities that Victoria will transfer to Suburban as a result of this agreement?

A. No, sir, except it is on an oral agreement, I presume.

Q. Who is installing these facilities which are to be turned over by Victoria to Suburban?

A. I don't know.

Q. Paragraph 8 of the agreement on page 4, you have indicated that a directors' resolution has

been adopted authorizing the execution and the carrying out of the agreement. Can you show me that resolution in your minute book?

A. Yes, sir. (Indicating)

Q. You are showing me, are you not, the minutes of a special meeting of the board of directors of Victoria Mutual Water Company held on July 29, 1963?

A. Yes, sir.

Q. At 4:00 p.m.?

A. Yes, sir.

Q. Was a copy of the agreement in the form represented by Exhibit 44 before the directors at that time.

A. Yes, sir, it was.

Q. And all of the directors were present as the minutes indicate, were they not?

A. Yes, sir.

Q. Paragraph 8 of the agreement, Exhibit 44. states:

'Further, said Victoria does hereby warrant and represent that approval to said directors' resolution and to the terms and conditions of this agreement have been given by stockholders representing more than 50 percent of the voting power of Victoria.'

Do you have any evidence of that stockholders' consent?

A. No, sir, except an oral understanding.

Q. And as Secretary signing Exhibit 44 were you satisfied that you could make such a warranty on the basis of that oral understanding?

A. Yes, sir, I was.

Q. What was the understanding — nature of the oral understanding?

A. It was assurance by Mr. Deitz, who is the Secretary of Suburban Water System, and by Mr. Hannon, who is the Vice-President of Suburban Water Systems consented and they owned the majority of the shares of Victoria Mutual.

Q. And were their representations as to these consents limited to the consent of Suburban Water Systems as a majority shareholder of Victoria?

A. Yes, sir, as far as I know.

Q. You indicated that Mr. Hannon was not at the meeting, was he?

A. No, sir.

Q Only Mr. Deitz was?

A. Mr. Deitz was not.

Q. When did you get these representations as to shareholder approval?

A. The afternoon prior to the meeting.

Q. So the shareholders gave you approval of an agreement which at that time had not yet been voted by the board of directors; is that correct?

A. I don't follow you, Mr. Lowry.

Q. You indicated that before the meeting at 4:00 o'clock on July 29 you had received oral assurances from Mr. Deitz and Mr. Hannon that the stockholders approved the execution of the agreement, approval of the agreement by the directors?

A. That they—yes, that they gave, representing the majority of the voting power, that they gave their approval and consent to the execution.

Q. And at the time you received that consent from the stockholders, majority stockholders, the meeting hadn't been held, had it?

A. No.

MR. MADDOX: I move to strike, asked and answered.

MR. LOWRY: He said he didn't understand the question before.

EXAMINER JARVIS: The answer will stand.

MR. LOWRY: Do you know of any other stockholder that gave their assent to the actions of the directors?

THE WITNESS: No, sir.

Q. Other than Suburban?

A. No, sir." (Reporter's Transcript, pp. 1073-76.)

Campbell testified as follows:

"Q. Are you in effect in day-to-day managerial supervision of California-Michigan Land and Water Company?

A. In a sense, yes.

Q. Do you exercise a similar function with respect to Victoria as President?

A. I have had no duties so far, sir.

Q. You are an officeholder, then, of Victoria?

A. Yes, sir.

Q. And you have attended directors' meetings, I gather.

A. Yes.

Q. How many directors' meetings?

A. The one since the day I was elected.

Q. And that was yesterday?

A. Yes, sir.

Q. That was your first directors' meeting?

A. Yes.

Q. And I gather you voted in favor of the execution of the agreement on behalf of Victoria, which is Exhibit 44?

A. Yes, sir.

Q. Did you discuss that agreement with your fellow directors before voting on it?

A. Yes, sir.

Q. Did you discuss the agreement with Mr. Garnier?

A. No, sir.

Q. Did you discuss it with Mr. Hannon?

A. No, sir.

Q. With Mr. Deitz?

A. No, sir.

Q. As President of Victoria is it correct that the effect of this agreement will take Victoria out of the water business in Tracts 27171 and 27172?

A. That is my understanding.

Q. Why would Victoria want to get out of the water business in that area?

A. Well, this I would not know, sir, I haven't been there long enough to have a grasp of the problems.

As I said, I have had the one meeting and since the election I haven't been in their office, I haven't the slightest idea.

Q. How did you know whether or not to vote for or against the sale, transfer agreement?

A. Well, it was the consensus of the other directors that that was the proper thing to do.

Q. You were guided by their consensus?

A. Yes, sir." (Reporter's Transcript, pp. 1080-82.)

. . .

"Q. Do you have any knowledge of the operations and facilities of the Victoria Mutual Water Company?

A. Absolutely nothing.

Q. Have you discussed the import of this proposed agreement, Exhibit 44, with anyone other than your fellow directors?

A. No, sir.

Q. Have you received advise or information with respect to it from anyone other than your fellow directors?

A. No, sir." (Reporter's Transcript, p. 1084.)

Carli testified as follows:

"Q. My question is: what considerations prompted Victoria to enter into an agreement that would take it out of the retail water business in those two tracts?

MR. MADDOX: Mr. Examiner, I think the question is a little unfair when he says 'what considerations.'

I think it is ambiguous and vague and I think almost unintelligible.

It means this witness' consideration, their collective consideration of the board of directors or of the various members of the board.

I think the question is very difficult for the witness.

MR. LOWRY: Let me rephrase it.

EXAMINER JARVIS: All right.

MR. LOWRY: What considerations prompted you to vote in favor of the agreement?

THE WITNESS: The consensus of the board.

Q. Who was there besides yourself as director?

A. The board was, entire board was present, the new board, myself, Bailey Kerr, Jim Campbell and Dwight Holcomb.

Q. You have indicated that you were influenced by the consensus of the board and Mr. Campbell has so indicated. Does it follow, then, that you were influenced by the views of Mr. Kerr and of Mr. Holcomb?

A. It was the general consensus of the board after discussion, that was the decision.

Q. Did you discuss the transaction with anybody else other than the three members of the, other members of the board?

A. I did not." (Reporter's Transcript, pp. 1089-90.)

As a result of the transfer, the rates for water users in Tracts Nos. 27171 and 27172 were substantially reduced.

It is clear from the foregoing evidence that Suburban, certain of its officers and persons connected with the subsidiary or related corporations conspired to, and did, willfully, by means of a device, charge more than authorized by law for water service in Tracts Nos. 27171 and 27172. The immediate question presented is the action which should be taken by the Commission which would best serve the public interest. San Gabriel, Suburban's competitor and the moving party in this situation, asks that Suburban be "de-certificated" in

Areas B and C and that San Gabriel be authorized to serve these areas. The record discloses that if San Gabriel were authorized to serve Areas B and C the rates for water service in these areas would be higher. A comparison of these rates is as follows:

3/4-Inch Meters

| Quantity Per Month In Cu. Ft. | Suburban Water Systems | San Gabriel Valley Water Company |
|---|---|---|
| 800 | $ 2.70 | $ 2.80 |
| 1000 | 2.70 | 3.24 |
| 1200 | 2.70 | 3.68 |
| 1400 | 2.70 | 4.12 |
| 1600 | 3.00 | 4.56 |
| 1800 | 3.30 | 5.00 |
| 2000 | 3.60 | 5.44 |
| 3000 | 5.10 | 7.36 |
| 4000 | 6.40 | 9.16 |
| 5000 | 7.70 | 10.96 |
| 10000 | 14.20 | 16.95 |
| 20000 | 24.20 | 28.96 |

Furthermore, it appears that the distribution facilities have already been constructed in Tracts Nos. 27171 and 27172 and are connected to Suburban's system. Sunset International has made certain advances toward this construction. As indicated in Decision No. 64047, the cost of San Gabriel's proposal to serve Areas B and C is substantially higher than the *advances* given to Suburban's *alter ego* Victoria. Even if it be assumed, for the sake of argument only, that Sunset International collaborated with Suburban in the manipulations heretofore chronicled and that no regard should be given to the financial impact upon it of any action taken herein, a change in certification could result in adverse consequences for the customers living in the areas here in-

volved. Authorizing San Gabriel to serve Areas B and C and preventing Suburban from so doing would not effectuate a transfer of the physical facilities. Unless an expeditious voluntary sale and transfer of these facilities was effected, the residents in the area might be left without water. Assuming a change in certification were ordered and that Suburban were permitted to serve existing customers until San Gabriel could serve, if a voluntary sale and transfer of facilities were not arranged, San Gabriel would have to parallel Suburban's lines with a new installation, and San Gabriel would not install these facilities without appropriate advances from Sunset International, which could not be compelled by this Commission to make such advances. In the circumstances, the Commission is of the opinion and finds that the interests of the customers living in Areas B and C would best be served by allowing Suburban to continue to serve these areas and by proceeding against Suburban, Victoria and the various individuals and other entities involved under applicable provisions of law.

The record also discloses that there are reasonable grounds to believe that Suburban, Victoria, Camille A. Garnier, C. H. Deitz, Phil J. Carli, Bailey Kerr, Roger Ellis, John Harper, James Campbell, and Dwight Holcomb are in contempt of this Commission for failing to comply with Decisions Nos. 64256 and 65210 in Application No. 43241 and Case No. 6323 in that they charged or assisted, aided or abetted in the charging of water rates in Tracts Nos. 27171 and 27172, located in Los Angeles County, greater than the rates authorized in said decisions. The Commission finds that Suburban, Victoria, Camille A. Garnier, C. H. Deitz, Phil J. Carli, Bailey Kerr, Roger Ellis, John Harper, James Camp-

bell, and Dwight Holcomb should be ordered to show cause why they should not be held in contempt by this Commission for failing to comply with, or aiding, assisting and abetting the failure to comply with Decisions Nos. 64256 and 65210.

The Commission is of the opinion that Suburban has violated Sections 2107 and 2108 of the Public Utilities Code, and the Commission's Chief Counsel will be directed to file an action against Suburban for penalties under the applicable provisions of the Public Utilities Code.

The Commission makes the following findings and conclusions:

*Findings of Fact*

1. Decision No. 64047, issued on July 31, 1962, should be modified by the addition of the findings, conclusions and ordering paragraphs hereinafter set forth.

2. In Decision No. 64047 this Commission authorized Suburban to construct and operate a public utility water system in Areas B and C, which are more particularly described in Exhibit No. 13 in these consolidated proceedings. Suburban was required by law to apply the rates in its applicable filed tariffs to Areas B and C.

3. From January 1, 1962 to date Suburban has owned a majority of the shares of common stock in an entity known as Victoria Mutual Water Company, and at all times from January 1, 1962, Suburban has had and exercised full control over the affairs and operations of Victoria.

4. Victoria is, and has been since at least January 1, 1962, the *alter ego* of Suburban.

5. Suburban, operating through its *alter ego* Victoria, caused water distribution systems to be constructed in Tracts Nos. 27171 and 27172, which tracts are located within Areas B and C.

6. Suburban, operating through its *alter ego* Victoria caused to be charged to customers in Areas B and C rates higher than those which Suburban was authorized to charge in these areas.

7. The following individuals were among those who participated in some or all of the transactions by which Suburban utilized and operated as aforesaid through Victoria as an *alter ego:* Camille A. Garnier, Roger Ellis, C. H. Dietz, John Harper, James Campbell, Phil A. Carli, Bailey Kerr, and Dwight Holcomb.

8. Victoria has operated as a public utility water company without proper operating authority from this Commission from at least March 7, 1963 to date, and on or about said date of March 7, 1963 dedicated its property and service to the public use.

*Conclusion of Law*

Suburban should be required to cause its *alter ego* Victoria to acknowledge its public utility status and file with the Commission the tariffs required by law.

ORDER

IT IS ORDERED that:

1. Within ninety days after the effective date of this order Suburban Water Systems shall cause its *alter ego* Victoria Mutual Water Company to file with this Commission: (1) a schedule of its rates and charges together with rules governing service to customers, a tariff service area map and sample copies of printed

forms normally used in connection with customers' services, in accordance with the requirements of General Order No. 96-A; (2) four copies of a comprehensive map, drawn to an indicated scale of not more than 400 feet to the inch, delineating by appropriate markings the tracts of land and territory which it serves, the principal water production, storage and distribution facilities and the location of its various water system properties.

2. The Chief Counsel of the Commmission is directed to institute proceedings before the Commission to determine whether Suburban Water Systems, Victoria Mutual Water Company, Camille A. Garnier, C. H. Dietz, Phil J. Carli, Bailey Kerr, Roger Ellis, John Harper, James Campbell, and Dwight Holcomb should be held in contempt for failing to comply with, or aiding, assisting or abetting the failure to comply with Decisions Nos. 64256 and 65210 in Application No. 43241 and Case No. 6323 in that they charged or assisted, aided or abetted in the charging of water rates, in Tracts Nos. 27171 and 27172, located in Los Angeles County, which water rates were greater than those authorized in the aforesaid decisions.

3. The Chief Counsel of the Commission is directed to file an action in the Superior Court against Suburban Water Systems for penalties for the violation of Sections 2107 and 2108 of the Public Utilities Code.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each party to these consolidated proceedings. The effective date of this order shall be twenty days after the completion of such service. The Secretary is further directed to cause personal service of this order to be made upon

Victoria Mutual Water Company, Camille A. Garnier, C. H. Deitz, Phil J. Carli, Bailey Kerr, Roger Ellis, James Campbell, and Dwight Holcomb.

Dated at San Francisco, California, this 25th day of November, 1964.

Frederick B. Holoboff
President
Peter E. Mitchell
Everett C. McKeage
George G. Grover
Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

## APPENDIX "C".

### Order Granting Rehearing.

Before the Public Utilities Commission of the State of California.

In the Matter of the Joint Application of Suburban Water Systems and Vallecito Water Company for Exchange of Portions of Service Area and for Certificates of Public Convenience and Necessity. Application No. 43578.

In the Matter of the Application of San Gabriel Valley Water Company for a Certificate of Public Convenience and Necessity to Furnish Water Service in Territory near the City of La Puente and City of Industry in Los Angeles County, California, and for Authority to Establish Rates for service therein. Application No. 44149.

Petition for rehearing of Decision No. 64047 having been filed by San Gabriel Valley Water Company, and the Commission being of the opinion that sufficient reason for granting said petition and holding a further hearing has been made to appear,

IT IS ORDERED that said petition for rehearing is hereby granted. A further hearing shall be held before such Commissioner or Examiner and at such time and place as hereafter may be designated.

The Secretary is directed to cause appropriate notice of further hearing to be mailed to all parties at least ten (10) days prior to such hearing.

Dated At San Francisco, California, this 26th day of March, 1963

George G. Grover
President
Peter E. Mitchell
Everett C. McKeage
Frederick B. Holoboff
William M. Bennett
Commissioners

## APPENDIX "D".

### Petition for Rehearing.

Before the Public Utilities Commission of the State of California.

In the Matter of the Joint Application of Suburban Water Systems and Vallecito Water Company for exchange of portions of service area and for Certificates of Public Convenience and Necessity. Application No. 43578.

In the Matter of the Application of San Gabriel Valley Water Company for a Certificate of Public Convenience and Necessity to furnish water service in territory near the City of La Puente and City of Industry in Los Angeles County, California, and for authority to establish rates for service therein. Application No. 44149.

This petition of Victoria Mutual Water Company, hereinafter referred to as "Victoria" to reopen proceedings under Application Nos. 43578 and 44149 respectfully shows that:

I

Victoria is a mutual water company organized and operated under and by virtue of the laws of the State of California. Victoria is not a party to the above referenced applications and has never been served with notice of the hearing or rehearing upon said matters. Victoria appears herein especially for the sole purpose of objecting to the jurisdiction of the Public Utilities Commission concerning certain findings made in Decision No. 68273 dated November 25, 1964, and does not by this appearance subject itself to jurisdiction

of the Public Utilities Commission concerning any matter or thing nor does it hereby waive any objection to which it is entitled concerning the jurisdiction of the Public Utilities Commission.

II

By Decision No. 64047 dated July 31, 1962, Suburban Water Systems, hereinafter referred to as "Suburban", was granted, among other things, a Certificate of Public Convenience and Necessity to serve certain areas designated in said proceedings as Areas B and C, which were wholly or partially owned by Sunset International Petroleum Corporation, hereinafter referred to as "Sunset International". Suburban was authorized to apply its then authorized tariffs in Areas B and C. Suburban was further authorized to enter into a contract with Sunset International providing for the refund of advances with securities. San Gabriel Valley Water Company, hereinafter referred to as "San Gabriel," also made application for a Certificate of Public Convenience and Necessity which was denied. Subsequently, on March 8, 1963, San Gabriel filed a Petition for Rehearing which sought to reopen the consolidated proceedings. The Petition alleged that subsequent to Decision No. 64047, Suburban had entered into a contract with Sunset Hills Service Company, hereinafter referred to as "Sunset Hills," a mutual water company, to deliver on demand approximately one and one-half million gallons of water in a 24-hour period to be used by Sunset Hills for the servicing of

Areas B and C, and that Sunset Hills had agreed to construct a water system and serve water to 97 lots within Areas B and C and owned by Sunset International.

III

The proceedings were reopened by the Public Utilities Commission and the same culminated in Decision No. 68273 dated November 25, 1964. Said Decision, among other things, found that the transaction alleged in the Petition for Rehearing by San Gabriel did in fact occur and that in addition thereto, Sunset Hills had not been able to obtain a permit from the California Corporations Commissioner and, therefore, had transferred the partially completed facilities for the conveyance of water to Victoria who had taken the place of Sunset Hills in this transaction. The Commission made, among others, the following findings of fact:

"***

4. Victoria is, and has been since at least January 1, 1962, the *alter ego* of Suburban.

***

8. Victoria has operated as a public utility water company without proper operating authority from this Commission from at least March 7, 1963 to date, and on or about said date of March 7, 1963, dedicated its property and service to the public use."

IV

Victoria is not a party to the above referred to Applications and was never served with notice of the hearing thereon or the Petition for Rehearing of said mat-

ters. By virtue of its finding that Victoria is a public utility and has dedicated its property and service to the public use, the Public Utilities Commission has deprived Victoria of property without due process of law, thereby violating the Fourteenth Amendment of the Constitution of the United States. Furthermore, since Victoria was not given notice of these matters, the Public Utilities Commission has no jurisdiction to issue any order affecting the property rights or operations of Victoria.

V

In the event that petitioner, by the filing of this petition or by any other act upon its part or by virtue of applicable law has waived the right to appear specially or cannot appear specially in these proceedings, and in order to preserve other objections to Decision No. 68273 in the event Victoria must seek further remedy, the following additional grounds for a rehearing on this matter are set forth for the Commission's consideration.

a. The evidence is insufficient to support Finding No. 4 that Victoria was the alter ego of Suburban and that in order for a finding of alter ego, the following elements must be present:

1. Substantial dominion and control;

2. A showing that a failure to disregard the corporate entity would sanction fraud and promote injustice;

3. Unity of such interest that the separate personalities of the corporations do not exist;

4. Under capitalization.

The only evidence before the Commission was that certain of the directors, officers and shareholders of Suburban were also officers and directors of Victoria and that Suburban owned the majority of the stock of Victoria. This evidence is totally insufficient to support a finding that Victoria was the alter ego of Suburban. The mere fact that a corporation owns the majority of the stock of another corporation and that the two have interlocking directorates or some of the officers and directors of one corporation are also the officers and directors of the other will not in and of itself support a finding of alter ego. The relationship of Suburban and Victoria is one that is quite common today due to the complexity of present day business and the resulting complexities of corporate structures. The logical conclusion to be derived from the Commission's position is that no subsidiary of a corporation can ever be a separate legal entity which is directly contrary to all applicable law.

b. The evidence is insufficient to support Finding No. 8 that Victoria has been operating as a public utility water company from at least March 7, 1963 to date, in that Victoria is a mutual water company and has never purveyed water to anyone except a shareholder of the company or a person or entity to which it is permitted to sell water pursuant to Public Utilities Code,

Section 2705. There is no evidence to show that Victoria has at any time violated the rules and regulations applicable to a mutual water company with reference to its dealings with Sunset International or Suburban.

c. Findings No. 8 and No. 4 are inconsistent.

WHEREFORE, Victoria petitions this Commission to reopen Applications No. 43578 and 44149, to provide Victoria an opportunity to be heard and thereafter to rescind, alter and amend its Decision No. 68273 dated November 25, 1964, as provided in Section 1708 of the Public Utilities Code, as follows:

1. Rescind Finding No. 4.
2. Rescind Finding No. 8.

Dated this 23rd day of December, 1964, at Beverly Hills, California.

Respectfully submitted,

J. Robert Maddox
By H. Roy Jeppson
Attorney for Victoria Mutual Water Company

## APPENDIX "E".

### Order Denying Rehearing.

Decision No. 68668

Before the Public Utilities Commission of the State of California

In the Matter of the Joint Application of Surburban Water Systems and Vallecito Water Company for exchange of portions of service area and for Certificates of Public Convenience and Necessity. Application No. 43578

In the Matter of the Application of San Gabriel Valley Water Company for a Certificate of Public Convenience and Necessity to furnish water service in territory near the City of La Puente and City of Industry in Los Angeles County, California, and for authority to establish rates for service therein. Application No. 44149

Suburban Water Systems and Victoria Mutual Water Company, having filed petitions for rehearing of Decision No. 68273, and the Commission having considered said petitions for each and every allegation therein, and being of the opinion that no good cause for granting a rehearing has been made to appear in either petition;

IT IS ORDERED that rehearing of Decision No. 68273 be, and the same is, hereby denied.

Dated at Los Angeles, California, this 2nd day of March, 1965.

Frederick B. Holoboff
President
Peter E. Mitchell
George G. Grover
William M. Bennett
A. W. Gatov
Commissioners

## APPENDIX "F".

### Petition for Writ of Review and Points and Authorities in Support Thereof.

In the Supreme Court of the State of California.

Victoria Mutual Water Company, a California corporation, Petitioner, vs. Public Utilities Commission of the State of California, Respondent.

*To the Honorable Supreme Court of the State of California:*

I

JURISDICTIONAL GROUNDS FOR PETITION

Petitioner does herein respectfully ask this Honorable Court to issue a Writ of Review, pursuant to Section 1756 of the Public Utilities Code, of Decision No. 68273 of the Public Utilities Commission of the State of California dated November 25, 1964. A Petition for Rehearing, pursuant to Sections 1731 and 1756 of the Public Utilities Code was filed with the Public Utilities Commission of the State of California, hereinafter referred to as "Commission" on December 24, 1964, and was denied on March 2, 1965. Copies of Commission Order No. 68273, the Petition for Rehearing and Order denying the same, are attached to this petition and designated Appendices "A", "B" and "C" respectively. By virtue of Article XII, Sections 22 and 23 of the Constitution of the State of California and Sections 1756 and 1761 of the Public Utilities Code of the State of California, this Honorable Court has original jurisdiction to issue a Writ of Review in this matter.

## II

## STATUS OF THE CASE AND NATURE OF THE PETITION FOR WRIT OF REVIEW

By its Decision No. 68273 dated November 25, 1964, the Commission found, inter alia, that Victoria Mutual Water Company, hereinafter referred to as "petitioner," was the alter ego of Suburban Water Systems, hereinafter referred to as "Suburban," which is a public utility under the jurisdiction of the Commission and that petitioner has been a public utility water company from at least March 7, 1963 to the present date, operating without proper operating authority from the Commission, and that petitioner has dedicated its property and service to the public use. The Commission ordered that Suburban cause the petitioner to file with the Commission various materials, including its rates and charges, and ordered the chief counsel of the Commission to institute contempt proceedings against petitioner. This action was taken by the Commission in a proceeding in which petitioner was not a party and was afforded no notice of the proceedings nor given an opportunity to appear therein.

## III

## STATEMENT OF THE CASE

Suburban and Vallectio Water Company, hereinafter referred to as "Vallecito," filed Joint Application No. 43578 before the Commission requesting, among other things, that each of their respective certificated areas be extended and that certain areas which were being served by Vallecito be relinquished to Suburban and that certain areas being served by Suburban be released to Vallecito. Before a decision was rendered on this ap-

plication, San Gabriel Valley Water Company, hereinafter referred to as "San Gabriel," appeared in the proceedings and objected to the same on the basis that it had received no notice. Accordingly, the proceedings were continued and on January 29, 1962, San Gabriel filed Application No. 44149 wherein it requested that any certificates held by Suburban or Vallecito in certain areas involved in Application No. 43578 be canceled and that San Gabriel be issued a Certificate of Public Convenience and Necessity to serve said areas. The Commission ultimately denied the application of San Gabriel and granted the application of Suburban and Vallecito in Decision No. 64047 entered on July 31, 1962. On March 8, 1963, San Gabriel filed a Petition for Rehearing which sought to reopen the proceedings in Application Nos. 44149 and 43578, alleging that Suburban, subsequent to Decision No. 64047, had entered into an agreement with Sunset Hills Service Company, hereinafter referred to as "Sunset Hills", whereby Suburban agreed to deliver to Sunset Hills one and one-half million (1,500,000) gallons of water in any twenty-four (24) hour period to the water distribution system of Sunset Hills. San Gabriel alleged that this agreement was an attempt by Suburban to circumvent the regulations of the Public Utilities Commission in the delivery and sale of water in the areas affected by said agreement and prayed that San Gabriel be substituted for Suburban in the areas involved in Application No. 43578. On March 26, 1963, the Commission entered an Order granting a rehearing on Decision No. 64047. The rehearing on these matters was held in Los Angeles on July 22, 23, 30 and 31, 1963. On November 25, 1964, the respondent made the sub-

ject Order that Suburban cause petitioner to file with the Public Utilities Commission a schedule of its rates and charges, together with other documents and ordered the instigation of contempt proceedings against petitioner. However, the Commission denied San Gabriel's request that it be substituted for Suburban in the areas involved in Application No. 43578. Prior to the rehearing, Sunset Hills transferred the agreement in question to petitioner. On July 29, 1963, Suburban and petitioner entered into an agreement whereby all of the water facilities owned by petitioner for the subject areas would be transferred to Suburban. Petitioner was not a party to the original application or the proceedings thereunder, nor was it given notice of the rehearing, although several of its officers and directors testified as witnesses at the hearing concerning the agreement of July 29, 1963 between Suburban and petitioner.

## IV

## ARGUMENT

### A. *The Findings and Orders of the Commission in Reference to Petitioner Were Made Without Affording Petitioner Due Process of Law.*

The Commission has exercised *in personam* jurisdiction over petitioner without giving it notice that any of its property rights would be affected thereby in violation of due process of law required by the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California. No person can be affected by a hearing or adjudication of a court of justice or a tribunal acting in a judicial manner without his volun-

tary appearance or affording to him by means of the service of process an opportunity to appear and contest a claim that may be made against him.

*Mullane v. Central Hanover Bank,* 339 U.S. 306, 70 Sup Ct. 652 (1950);

*Dillard v. McKnight,* 34 C 2d 209, 209 P 2d 387 (1949);

It is necessary that the Commission give notice for an order bringing a company under its jurisdiction to be valid.

*Southern Pacific Co. v. Public Utilities Commission,* 41 C 2d 354, 260 P 2d 70 (1953).

Adequate notice and an opportunity to be heard must be given by the Commission to any person affected before a valid order may be made respecting his property rights.

*People v. Western Air Lines,* 42 C 2d 621, 268 P 2d 723 (1954).

Furthermore, even assuming that petitioner had knowledge that the proceedings were being conducted, an order could not be made affecting petitioner's interest unless petitioner was a party to the proceedings. Since petitioner had not been made a party to the proceedings. It had no reason to believe that its rights would be adjudicated by said proceedings. The purpose of notice is to inform a party that a proceeding is taking place which may affect his rights, in order that he may defend his interests. If a party does not receive notice sufficient to satisfy due process, he may reasonably conclude that said proceedings will have no effect upon either him or his property. In *Motores De Mexicali, S A*

*vs. Superior Court,* 51 C 2d 172, 331 P 2d 1 (1958), the lower court denied a Writ of Mandate to compel the respondent court to proceed with a motion to correct the final judgment by adding certain individuals on the grounds that the corporate defendant was their alter ego. The court stated that the individuals were not parties to the lawsuit and, therefore, could not be bound by the judgment. The following language by the court at 331 P 2d 3 is very pertinent to our case:

> "Nor is this difficulty overcome by the suggestion that Resnick and the Cowans (the individual stockholders) should have intervened in the action brought solely against Erbel, Inc. (the corporate defendant), if they desired to assert any personal defenses against the drafts. They were under no duty to appear and defend personally in that action, since no claim had been made against them personally." (Parentheses Added)

Nor can the Commission argue that petitioner had notice of the hearing because it was the alter ego of Suburban. The Commission had no jurisdiction or power to determine that petitioner was the alter ego of Suburban without first obtaining jurisdiction over petitioner. Yet the Commission determined that petitioner was the alter ego of Suburban in order to obtain jurisdiction over petitioner. The circuity in such reasoning can be readily seen without strong comment, and the courts have uniformly rejected this reasoning.

*Retail Clerks Union, Local 770 vs. Thriftimart, Inc.,* 59 C.2d 421, 30 Cal Rptr 12 (1963);

*Motores De Mexicali, S A vs. Superior Court,* supra.

B. *The Conclusion of Law that Petitioner is the Alter Ego of Suburban is Not Supported by the Findings.*

Finding of Fact No. 3 in the subject Order states that from January 1, 1962 to the present date, Suburban has owned the majority of the shares of stock in petitioner and that at all times since said date, Suburban has had and exercised full control over the affairs and operations of Victoria. Finding No. 4, which is actually a conclusion of law, states that petitioner is the alter ego of Suburban. Finding No. 3 is the only finding that bears on the question of the alter ego relationship of petitioner to Suburban and is totally inadequate upon which to predicate a determination that petitioner is the alter ego of Suburban. Since the holding that petitioner is the alter ego of Suburban is a conclusion of law, it may be reviewed by this Honorable Court on a Writ of Review.

*Southern Pacific Co. vs. Public Utilities Commission,* supra.

The cases uniformly hold that in order to find alter ego, two requirements must be present, to wit: (1) That not only is the corporation influenced and governed by an individual or other equity but that there is such unity of interest and ownership that the separate personalities of the corporation on one hand and the individual or other entity on the other hand no longer exists; and (2) That if the acts are treated as those of the corporation alone, an inequitable result will follow.

*Minifie vs. Rowley,* 187 C 481, 487, 202 P 673 (1921);

*Associated Vendors, Inc. vs. Oakland Meat Co.*, 210 C A 2d 825, 26 Cal Rptr 806 (1963); *Automotriz, etc. De California vs. Resnick*, 47 C 2d 792, 796, 306 P 2d 1, 3 (1957).

In *Luis vs. Orcutt Town Water Co.*, 204 C A 2d 433, 22 Cal Rptr 389 at 395 (1962), it was stated:

> "It is not true that any wholly-owned subsidiary is necessarily the *alter ego* of the parent corporation. The corporate entity of the wholly-owned subsidiary will be disregarded only when recognition of the separate entities of parent and subsidiary would produce fraud or injustice. (Citations). Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence. (Citations)."

The finding that Suburban owns a majority of the outstanding stock of petitioner and that Suburban has exercised control over the affairs of petitioner are insufficient as a matter of law to find alter ego. There is absolutely nothing in the Commission Order, its Findings of Fact, or Conclusions of Law which indicates that the separate identities of petitioner and Suburban have ceased to exist or that at any time petitioner acted other than in its own best interest. Furthermore, in the absence of actual evidence of bad faith, fraud or injustice, it would be gross error to disregard the corporate existence of petitioner and Suburban and to conclude that one is the alter ego of the other. The existence of a corporation separate from the stockholders cannot be disregarded upon suspicion, surmise, or conjecture.

*Consolidated Photographic Industries, Inc. vs. Marks*, 109 C A 2d 310, 240 P 2d 718 (1952).

C. *Finding No. 4 and Finding No. 8 of the Subject Order Are Inconsistent.*

Finding No. 4 is to the effect that petitioner has been the alter ego of Suburban since January 1, 1962. On the other hand, by Finding No. 8, the Commission determined that petitioner has operated as a public utility water company without proper operating authority from March 7, 1963 to the present date, and that on or about said date, petitioner has dedicated its property and service to the public use. If, assuming for the purposes of argument, petitioner is the alter ego of Suburban, then it is impossible that petitioner is operating as a public utility water company because it has no existence separate and apart from Suburban. The *Luis* case, supra, recognizes this dilemma by the following statement at 22 Cal Rptr 395:

> "Secondly, if the *alter ego* theory were pleaded effectively and if the doctrine is applied, it pleads the contract* (between the corporation and its wholly-owned subsidiary) upon which plaintiff relies out of existence; with only one entity to consider the contract becomes a nullity because it is impossible for a legal entity to contract with itself. One of the essential elements of a contract is 'parties capable of contract' (Citation), and there must be an assent of at least two separate, independent minds for no person, natural or corporate, can effectually make a contract with himself. (Citation)."

*(Parenthesis added.)

These inconsistent findings require a reversal of the Commission Order.

*Zweig vs. Fireman's Fund Indem. Co.,* 139 C A 2d 461, 293 P 2d 812 (1956);

*Andrews vs. Cunningham,* 105 C A 2d 525, 233 P 2d 563 (1951).

## V

## CONCLUSION

The Order so far as it affects petitioner is void for the reason that petitioner was not a party to the proceedings, had no notice of the proceedings, and was not given an opportunity to appear in the same. Furthermore, even if due process were satisfied as far as notice of the proceedings and opportunity to appear therein are concerned, the Order would be clearly erroneous as to the finding that the petitioner is the alter ego of Suburban because the Findings of Fact do not sustain the conclusion of law that alter ego is present, even assuming the Findings are supported by the evidence. Furthermore, the finding that petitioner is a public water company and the finding that it is the alter ego of Suburban are clearly inconsistent and, therefore, the Order must be reversed.

Wherefore, petitioner respectfully prays that this Court issue a Writ of Review under Section 1756 of the California Public Utilities Code and upon such a Writ and a hearing thereon, this Court make its determination that Decision No. 68668 as it affects petitioner, is unlawful and should be set aside and annulled and that this petitioner be granted such other and further relief as may be considered by this Court to be just and proper.

Dated this 31st day of March, 1965, at Beverly Hills, California.

J. Robert Maddox
By /s/ H. Roy Jeppson
Attorney for Petitioner

Verification and Affidavit omitted.

Commission Order No. 68273 (Appendix "A"), Petition for Rehearing (Appendix "B"), and the Order Denying Rehearing (Appendix "C") have been omitted. These items are included elsewhere in this Petition as Appendix "B", Appendix "D" and Appendix "E" respectively.

———

## APPENDIX "G".

*Section 1 of the Fourteenth Amendment to the Constitution of the United States*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*California Public Utilities Code, Section 1756*

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. (As amended Stats. 1963, c. 461, p. 1310, § 6.)"

*California Public Utilities Code, Section 2705*

"Any corporation or association which is organized for the purpose of delivering water to its stockholders or members at cost, and which delivers water to no one except its stockholders or members, or to the State or any agency or department thereof, to any city, county, school district, or other public district, or to any other mutual water company, at cost, is not a public utility, and is not subject to the jurisdiction, control or regulation of the commission . . ." (As amended Stats. 1961, c. 395, p. 1448, § 1.)